



**Fourth Court of Appeals**  
**San Antonio, Texas**

**MEMORANDUM OPINION**

No. 04-15-00008-CV

**BAKKE DEVELOPMENT CORP.,**  
Appellant

v.

Eddie L. **ALBIN** and Kim A. Albin,  
Appellees

From the 216th Judicial District Court, Kendall County, Texas  
Trial Court No. 13-192  
Honorable Bill R. Palmer, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice  
Patricia O. Alvarez, Justice  
Luz Elena D. Chapa, Justice

Delivered and Filed: March 16, 2016

**AFFIRMED**

Bakke Development Corp. (“Bakke Corp.”) challenges the trial court’s order granting summary judgment in favor of Eddie L. Albin and Kim A. Albin. We affirm the judgment of the trial court.

**BACKGROUND**

The Albins own a 65-acre tract of land located in Boerne, Texas, known as the Theis Property. Representatives from Bakke Corp. met with Eddie Albin to discuss the possibility of developing the property. As alleged in Bakke Corp.’s First Amended Original Petition, the parties

formed a general partnership for the development and operation of the Theis Property as an apartment complex/mixed use development (hereinafter, the "Project"). According to Bakke Corp., per the terms of the partnership, the parties agreed that:

- Albin would contribute the Theis Property to the partnership;
- Bakke Corp. would contribute to the partnership a retail shopping center and the associated real property known as the "Menger-Shumard Retail Center";
- Bakke Corp. would pay debt associated with the Theis Property out of cash flow from the Menger-Shumard Retail Center and/or through the proceeds of debt financing obtained by Bakke Corp.;
- Bakke Corp. would develop and operate the Project; and
- Bakke Corp. and Albin would share equally the profits and losses of the Project.

Thereafter, Bakke Corp. began development of the Project, including obtaining plans and meeting with governmental officials to obtain the necessary approvals to commence the Project. Additionally, Bakke Corp. attempted to obtain financing for both the Project and the debt associated with the Theis Property. It is undisputed that the parties did not sign a writing embodying the terms of the alleged oral agreement; in fact, Phillip Bakke, president of Bakke Corp., testified that he felt a signed agreement was unnecessary and claimed the parties solidified their agreement by ending their negotiations with a handshake.

Albin, however, later disclaimed the partnership and refused the partnership use of the Theis Property. Consequently, Bakke Corp. filed suit, alleging that the parties had orally agreed to the formation of an oral general partnership and that Albin breached the agreement. Bakke Corp. alleged that Albin used Bakke Corp. and the partnership to forestall a bank foreclosure on the property until Albin could gain other resources to pay off an \$800,000 debt against the property and hold the property free and clear. Bakke Corp. specifically sued Albin for breach of the partnership agreement; breach of fiduciary duty and constructive trust; promissory estoppel and partial performance; and fraud and unjust enrichment.

In response to Bakke Corp.’s lawsuit, Albin filed a “Motion for Partial Summary Judgment on Applicability of the Statute of Frauds” arguing that the statute of frauds prohibited enforcement of the oral agreement because (1) the agreement could not be performed within one year, (2) the agreement involved the transfer of an interest in land, (3) there was no signed writing, and (4) no exception applied to prevent application of the statute of frauds. The trial court granted the motion and adjudged that “the Texas ‘statute of frauds,’ Texas Business and Commerce Code Section 26.01, applies to the oral agreement alleged by the Plaintiff in this cause and prohibits judicial enforcement of that agreement under any theory or cause of action for which the statute of frauds is a defense recognized under law.”

Thereafter, Albin filed a hybrid motion for summary judgment. Based on the trial court’s ruling that the statute of frauds applied to the oral partnership agreement, Albin asserted that the agreement was unenforceable as a matter of law. As no-evidence grounds, he argued that there was no evidence to support Bakke Corp.’s claims for breach of the partnership agreement, breach of fiduciary duty, fraud, constructive trust, and unjust enrichment. Bakke Corp. filed a response, and Albin filed a reply as well as objections to Bakke’s summary judgment evidence. After considering the parties’ filings, the trial court granted the hybrid motion for summary judgment in its entirety and Bakke Corp. timely appealed.

### **DISCUSSION**

We review the trial court’s grant of summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Willmann v. City of San Antonio*, 123 S.W.3d 469, 472 (Tex. App.—San Antonio 2003, pet. denied). When, as here, a trial court’s order granting summary judgment does not specify the ground or grounds relied on for its ruling, summary judgment will be affirmed on appeal if any theories advanced are meritorious. *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989). When a party files a hybrid summary judgment motion on both

no-evidence and traditional grounds, we first review the trial court's judgment under the no-evidence standard of review. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). This is so because the non-movant has the burden to present evidence establishing a material issue of fact concerning the element under attack. *Id.* If he fails to produce legally sufficient evidence to meet his burden, there is no need to analyze whether the movant satisfied its burden under the traditional motion. *Id.*; *see also Vause v. Liberty Ins. Corp.*, 456 S.W.3d 222, 226 (Tex. App.—San Antonio 2014, no pet.).

Here, Albin's hybrid motion for summary judgment set forth multiple grounds for relief. On appeal, Bakke Corp. only challenges the trial court's determination that the statute of frauds applies to the parties' oral partnership agreement and, as a matter of law, precludes enforcement of the partnership agreement. It did not raise any issue addressing the no-evidence grounds alleged in Albin's hybrid motion for summary judgment. When an appellant fails to challenge each possible ground upon which summary judgment could have been rendered, we must uphold the summary judgment. *Krueger v. Atascosa Cnty.*, 155 S.W.3d 614, 621 (Tex. App.—San Antonio 2004, no pet.) ("Unless an appellant has specifically challenged every possible ground for summary judgment, the appellate court need not review the merits of the challenged ground and may affirm on an unchallenged ground."); *Lowe v. Townview Watersong, L.L.C.*, 155 S.W.3d 445, 447 (Tex. App.—Dallas 2004, no pet.) ("Because summary judgment may have been granted on the unchallenged no-evidence grounds, we must affirm the trial court's summary judgment."). We conclude that the no-evidence grounds raised in Albin's hybrid motion for summary judgment could, if meritorious, fully support the judgment, and because Bakke Corp. raised no issue with respect to that portion of the motion, we accept the validity of the unchallenged grounds for granting the summary judgment against Bakke Corp. Accordingly, we affirm the trial court's granting of Albin's no-evidence motion for summary judgment. By affirming the granting of the

no-evidence motion, we need not address the propriety of granting Albin's traditional motion for summary judgment. *See Willowbrook Foods, Inc. v. Grinnell Corp.*, 147 S.W.3d 492, 500 (Tex. App.—San Antonio 2004, pet. denied); *Weyel v. Hopson*, No. 04-14-00085-CV, 2015 WL 505078, at \*3 (Tex. App.—San Antonio Feb. 4, 2015, no pet.) (mem. op.); *Estate of Hunt ex rel. Payton v. St. Paul Fire & Marine Ins. Co.*, No. 04-05-00334-CV, 2006 WL 1004870, at \*4 (Tex. App.—San Antonio Apr. 19, 2006, pet. denied) (mem. op.). We thus overrule Bakke Corp.'s issues on appeal.

### CONCLUSION

Having overruled Bakke Corp.'s issues on appeal, we affirm the judgment of the trial court.

Rebeca C. Martinez, Justice